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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 1043

CECIL H. BENNETT,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner Cecil H. Bennett prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 30, 1964.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit, is not reported and is printed in Appendix "A" hereto (pp. 41-66). The opinion of the District Court is not reported and is printed in Appendix "B" hereto (pp. 67-82).

JURISDICTION.

The judgment of the Court of Appeals was entered on March 30, 1964 (Appendix "A", p. 41). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED.

1. Whether a common purpose and participation in a single over-all conspiracy to embezzle in violation of the Landrum-Griffin Act from three labor organizations by multiple schemes may be ascribed to a union's secretary-treasurer (involved in a single fraudulent scheme against his own union), where he has no knowledge of the existence of such other schemes and none may be inferred; and if not, whether petitioner has been prejudiced thereby.

2. Whether a conviction for a single conspiracy and sentence of two years' imprisonment can be permitted to stand where under the court's charge and the record "there is no way of determining precisely . . . whether or not the jury in fact found a single conspiracy."

3. Whether counsel for a testifying defendant in a criminal prosecution has the right to comment in his argument to the jury upon the fact of his client's testimony denying guilt and the failure of his co-defendants to testify, and to draw inferences therefrom favorable to his client and unfavorable to the co-defendants.

4. Whether the notes of F. B. I. agents taken contemporaneously with their interview of a witness, recording in long hand as accurate as possible the answers of the witness, but not containing every word of the witness, is a "substantially verbatim" record whose production is required under Title 18, U. S. C., Section 3500 (e) (2), where such notes were subsequently used by the agents to formulate a smooth report which was examined

and approved by the witness and tendered to defense counsel at the trial pursuant to Section 3500.

5. Whether in a criminal prosecution the trial court has the **discretion** to deny the defense the right to call as a witness one of the three government prosecutors, who possesses information vital to the impeachment of the government's informer and chief witness, where the information is not available from any other source.

STATUTES INVOLVED.

Title 29, U. S. C., Section 501 (c) and the Jencks Act, 18 U. S. C., Section 3500, are printed as Appendix "C" to this petition (pp. 83-85).

STATEMENT.

The indictment here was in sixteen counts, involving as defendants Roy Lee Williams, Karl L. Rogers, Earl Dean Williams, Floyd Rairdon Hayes, Robert Leroy Williams, Cecil H. Bennett, and Stanley Burk Clevenger. There were also named as co-conspirators but not defendants some fifteen others; namely, Harold A. Priest, Reuben J. Levine, Norbert S. O'Neill, Wilson Armour, William M. Hampton, Clifford F. Hecht, John M. Stous, Dudley C. Talley, George Howse Temple, James T. Malkansky, Max Okun, Mojac Missouri Company, Hoffman Buick Company, Greenlease-O'Neill, Inc., and La Louisiane, Inc. Count One charged that all seven defendants, including petitioner, together with their unindicted co-conspirators conspired to violate subsection (c) of Section 501, Title 29, U. S. Code, by embezzling and stealing monies and other property of a certain three labor organizations—Local 41, Local 541, and Joint Council 56—all affiliated with the International Brotherhood of Teamsters. The remaining fifteen counts charged substantive violations of subsection ( ) of Section 501, by the actual stealing

and embezzling of money or property from each of the named labor organizations.

Roy Lee Williams, Karl L. Rogers, and Earl Dean Williams were acquitted of the conspiracy charge and all substantive counts in which they were named. Robert Leroy Williams, who became the government's chief witness, pleaded guilty to all counts in which he was charged. Floyd Rairdon Hayes was convicted on the conspiracy count and twelve substantive counts; Stanley Burke Clevenger was convicted on the conspiracy count and two substantive counts; petitioner Cecil Bennett was convicted upon the conspiracy count and one substantive count, and was acquitted on seven substantive counts.

Local 41, Local 541, and Joint Council 56 maintained their offices in the same building at 116 West Linwood Blvd., Kansas City, Missouri (R. 64). The officers of Local 41 during the period covered by the indictment, were: President, Roy Williams (an acquitted defendant below); Secretary-Treasurer, petitioner Cecil Bennett; Vice-President, Lawrence Kappelman (R. 62). Floyd Hayes had been the Secretary-Treasurer of that Local for a long period of time, up until some time in 1960 when he was succeeded by Cecil Bennett (R. 62). The President of Local 541 was Karl Rogers (an acquitted defendant below), but none of the other officers in that union were involved as defendants or co-conspirators in the case (R. 63). Joint Council 56 was a coordinating body for the various local unions in the Kansas City area, and its President was also Roy Williams (R. 66), while its Secretary-Treasurer had formerly been Floyd Hayes (R. 65). Clevenger was an assistant business agent for Local 41 (R. 69); Robert Leroy Williams (the defendant who testified for the government) had been an employee of Locals 41 and 541 since 1954, and was in charge of the referral hall at the union building (R. 61).

Within a six-month period beginning in 1954 charge accounts had been opened by the three named labor organizations at La Louisiane Restaurant in Kansas City, Missouri for use by their respective officers and agents who would sign the charge tickets later paid by the particular labor organization (R. 343, 346). Sometime in 1955 Hayes agreed with Reuben Levine, the owner of the restaurant, that Local 41's bill be increased by $240.00 per month, of which $200 was to be kicked back to Hayes and $40 to be kept by Levine (R. 34[illegible]). In a matter of six months this arrangement had been extended to the accounts of Joint Council 56 and Local 541 (R. 351). Hayes picked up the padded amounts until he left for the penitentiary in August, 1949, when Robert Williams took up the collecting (R. 355). According to Robert Williams, others who were parties to the La Louisiane agreement and shared in the kickbacks were Karl Rogers, Roy Williams and Robert Williams himself (R. 95, 98). Neither Bennett, Clevenger nor Earl Dean Williams knew anything about the La Louisiane scheme (R. 225, 228, 229, 237). No evidence was introduced showing any knowledge of the La Louisiane arrangement by any of the other co-conspirators named in the indictment and not named as defendants.

The same type of arrangements was made with Harold's D-X Service Station where the three labor organizations had opened charge accounts sometime in 1954 or 1955 (R. 498). The first agreement to defraud was made in the first part of 1955 between Hayes and Borello, the then owner of the service station, and was confined solely to Local 41 (R. 504). A short while after their first conversation about Local 41, Hayes set up the same procedure with Borello as to Joint Council 56 (R. 507). Approximately six months later, still in 1955, Hayes and Borello applied the same pad arrangement to Local 541 (R. 510). Borello kicked back to Hayes until he sold the station to

his associate Harold Priest on June 30, 1957 (R. 513-514). Priest continued the kickbacks to Hayes until Hayes left for the penitentiary in the fall of 1959 (R. 537) when Robert Williams commenced picking up the kickbacks (R. 542). According to Robert Williams others who were parties to the over-all scheme at Harold's D-X were Roy Williams, Karl Rogers and Robert Williams himself (R. 95, 99). Neither Bennett, Clevenger, nor Earl Dean Williams knew anything about the service station kickback (R. 225, 228, 229, 237). No evidence was introduced showing any knowledge of this arrangement by any of the other conspirators named in the indictment.

The Hoffman Buick agreement took place in conversations between Hayes and Dudley Talley, Hoffman's shop foreman and an unindicted conspirator, in 1956 and 1957. The substance of the agreement was that some other equipment at Local 41 would be brought in for repairs, and the union officials would instruct Hoffman personnel as to what official union cars the repairs should be charged (R. 610). Such repair orders describing different cars than those actually repaired were written on instructions of Hayes, Bennett and Clevenger and billed to Local 41. Charges totaling several hundred dollars were also billed to and paid by Joint Council 56 (R. 611-638) but no charges were ever billed to Local 541. Other Hoffman Buick employees involved as unindicted conspirators were James Malkausky and George Temple. No Hoffman Buick employee testified as to any involvement of Roy Williams, Earl Dean Williams, or Karl Rogers in the fraudulent billing scheme, and no other alleged co-conspirators, such as Harold Priest, Reuben Levine, Max Okun, etc., were shown to have had knowledge of such a fraudulent scheme as existed at Hoffman Buick.

The Greenlease-O'Neill, Inc., agreement was one to defraud Local 41 and Joint Council 56; it evolved out of

a conversation in 1957 between Hayes and Wilson Armour, the Greenlease service manager (R. 788). Armour's instructions were to write the repair order for another car than the one repaired (R. 789). In 1959 Hayes and Norbert S. O'Neill of Greenlease-O'Neill, Inc., worked out a scheme whereby Greenlease-O'Neill billed and titled a jeep to Earl Dean Williams and fraudulently billed the balance of certain payments to Joint Council 56 on its monthly service account (R. 779). William Hampton, another Greenlease-O'Neill service salesman, had also written false repair orders for Hayes, Robert Williams and Clevenger pursuant to a conversation with Hayes in late 1957 or 1958 (R. 812-813). The accounts fraudulently billed by Greenlease-O'Neill were to Local 41 and Joint Council 56 (R. 815-824). Clifford Hecht, assistant service manager, prepared a fraudulent billing of the balance of the jeep's purchase price to Joint Council 56 (R. 842-846). There were no business dealings between Greenlease-O'Neill and Harold's D-X Service Station or Reuben Levine or La Louisiane, nor were any of the other named co-conspirators such as Talley, Temple, Malkausky, etc., shown to have any connection with the Greenlease-O'Neill scheme. There were no billings to Local 541.

The Gallup Stationery fraud arose out of the purchase of office and lounge furniture which was paid for by Local 41 (R. 898, 899). On February 23, 1961 Roy Williams and Floyd Hayes were in Gallup's store and Williams ordered certain office furniture which was delivered to the union building (R. 912). In March, 1961, Hayes came in alone and bought lounge furniture and five chairs for his recreation room (R. 913) all of which was paid for by Local 41. No other co-conspirators were implicated in these transactions.

The fraudulent charges at Paul Greenlease Cadillac were to Local 41 and Joint Council 56 (R. 926-930). Robert

Williams on September 29, 1959 brought in to the Paul Greenlease service salesman, Orville Moyer, a 1958 Cadillac which Williams stated belonged to Mrs. Hayes, but had the repairs billed to Joint Council 56 (R. 931). A 1957 Cadillac convertible belonging to Roy Williams was repaired at the expense of Local 41 (R. 928-929). No other co-conspirators were shown to have any knowledge of the fraud at Paul Greenlease Cadillac.

The Missouri Mojac fraud arose first in connection with work done at Hayes' home in the latter part of 1959 (R. 945). Okun's original conversation with Hayes was with regard to building an open porch behind the house, connected to the garage (R. 945); it took place just prior to August 5, 1959. Hayes gave Okun a Local 41 check to cover the original estimate (R. 946, Exhibit N-1). Subsequently, the job was expanded at Mrs. Hayes' direction, to converting the porch into a closed weatherproof room (R. 949). Later Okun received payment from Local 41 for the balance due on this job begun in the fall of 1959 (R. 959). On another occasion Missouri Mojac did some additional work at Hayes' home in early 1961, lasting a few weeks (R. 967); about this same time Okun was completing a major improvement job for Local 41 at the Union building (R. 966). Missouri Mojac received payment for the 1961 work done at Hayes' home by adding it to the contract price for Local 41's work (R. 971). All the work done by Okun at Hayes' home was paid by Local 41; none of it was billed or paid for by Local 541 or Joint Council 56 (R. 1006). Neither Karl Rogers, nor any of the other named co-conspirators such as Bennett, Clevenger, Priest, Levine, etc., were shown to have had knowledge of this fraudulent scheme to have Local 41 pay for repairs and renovations to Hayes' home.

In summary, petitioner Bennett, except for the ministerial act of co-signing check as an officer of Local 41, was

not involved in any fraudulent scheme other than the one at Hoffman Buick. Neither did he receive any of the converted funds, nor have any knowledge of the frauds at La Louisiane, Harold's D-X, Greenlease-O'Neill, Paul Greenlease Cadillac, Gallup Stationery and Missouri Mojac. "As for [petitioner] Bennett, Williams testified that, so far as he knew, Bennett was not involved in the corrupt accounts of the La Louisiane Restaurant and Harold's D-X Service Station (R. 229-230). In fact, the only item of testimony he gave relating to Bennett, i. e., Bennett's picking up the final kick-back from Harold's D-X and returning same, was not, in itself, incriminating (R. 139-40). It was corroborated by Harold Priest and admitted by Bennett himself (R. 1545-46). Bennett was acquitted on the substantive counts involving the La Louisiane and Harold's D-X frauds. He was convicted only on the substantive count involving fraudulent repair bills at Hoffman[n] Buick Company, and on the conspiracy count. It is obvious from the pattern of the verdict, therefore, that his conviction rested upon the testimony of Dudley Talley and other employees at Hoffman Buick Company." **Brief for the United States**, p. 33.

On cross-examination, the government's chief witness Robert Williams was questioned extensively concerning his various conversations with government agents at the time he decided to become a government witness. He was interviewed by F. B. I. agents in Topeka, Kansas, on June 23 and June 24, 1962 (R. 266)—after this prosecution had been instituted. The witness then testified that some time **after** these interviews with the F. B. I. agents, he met with Mr. Featherstone, counsel for the government, and with regard to what he expected to gain from his testimony, he testified as follows (R. 273-274):

"Q. Didn't you ask him what this cooperation was going to get you?

A. I wasn't in any bargaining position.

Q. Well, did you ask Mr. Featherstone in any language that you want to use words to the effect, 'What am I going to get for cooperating to the government?'

A. At the subsequent meeting naturally I was concerned about what was going to happen to me. Mr. Featherstone told me they could ask the court—they couldn't make any promises; they could ask. Make recommendations I believe was the word.

Q. In other words, he told you in words to this effect, 'I am not the judge and I can't tell you what sentence you are going to get, but I can certainly make a recommendation to the judge if you tell your story that you get favorable treatment,' isn't that about what he said?

A. No. He used the word recommendations.

Q. Recommendations. He would recommend to the judge you get leniency? Right?

A. I couldn't say what he meant to recommend. All I can say is that he used the word recommendations.

Q. What did you take this to mean?

A. I took it to mean he would tell the court that I had fully cooperated and told the story as it was, and that was it.

Q. And you expected leniency from the court, isn't that it?

A. I couldn't tell what I expected. My expectations—I can't——"

Subsequently the government and the defense entered into a stipulation that the witness, Robert Williams, saw and met Mr. Featherstone for the first time on June 17, 1962 (R. 297), which was contradictory of Robert Williams' testimony on this matter.

Prior to the cross-examination of government witness Robert Williams, the petitioner called as a witness Orson Myers, Jr., an FBI agent, in order to ascertain whether or not the government had fully complied with its obligations under 18 U. S. C., Section 3500. Mr. Myers testified that he interviewed witness Robert Williams a total of five times (R. 174), and that he actively participated in the interview processes (R. 174). The agent further testified that during the interview he and another agent would ask questions, Williams would answer them, and the agents would then discuss the circumstances involved in the answers, and write down such answers, each agent writing a portion thereof (R. 175). The agent further testified that he made notes on all of the answers given by Williams, and dictated the results very shortly thereafter from said notes, and that those notes were sufficiently complete so that "I can make an accurate transcription" (R. 175). The interviews with Williams on June 23 and 24, 1962, were converted into a final report form on June 25, 1962, and typed by a stenographer on June 26, 1962 (R. 176). Within a week or ten days, and possibly as long as 30 days thereafter, the agent destroyed the notes from which he dictated his report (R. 178); this took place at least four months after the instant indictment had been returned when prosecution was already an accomplished fact. The agent indicated that he was familiar with the **Jencks** decision by the Supreme Court, and was also familiar with Section 3500, Title 18, of the U. S. Code (R. 178). It had been Agent Myers' practice to retain notes after transcription of interviews only when precise data was recorded (R. 178). The Agent's original notes were not read or approved by Williams, only the reports as they now stand in final form (R. 181). Agent Myers further testified that while some of the words in his notes may have been abbreviated (R. 188), he had attempted to take down as accurately as

he could the answers which he got from Williams, which answers were in the notes he had destroyed (R. 189). His final dictated report was based upon his notes as supplemented by his own memory (R. 188).

With regard to these notes, petitioner below then made the following motion (R. 183):

> "Mr. Wadden: Of course, your Honor, we take the position that they are covered by E-2, and that the government's failure to produce them gives us the right to move to strike the entire testimony of the witness, Robert L. Williams, and on behalf of my client, in view of the government's failure to produce the original longhand notes to the agent, I now move that his entire testimony be struck.
>
> The Court: Very well. Let the record so show, that the motion is made and overruled."

During the defendants' case below, counsel for the defense attempted to call as a witness Mr. James Featherstone, the special assistant attorney general who was one of three government counsel participating in the prosecution of the case (R. 1487). A considerable discussion took place between counsel and the court, out of the hearing of the jury, the pertinent portion of which is as follows (R. 1487-1497):

> "The Court: . . . . What is the purpose of it?
>
> Mr. Wadden: The purpose, Your Honor, is I want to ask Jim a few questions about the first time he met Bob Williams, about the conversation that took place between them, having to do with motive of Mr. Bob Williams. Also the record is in conflict. Mr. Williams' testimony is he had given a complete statement to the Federal Agents before he ever met Mr. Featherstone. We have no such statements. They have not been made available, if it were true.

The Court: Also I don't quite see the direct connection between that case and your situation here. Now, what is the purpose of your testimony or calling Mr. Featherstone?

Mr. Wadden: My purpose in calling Mr. Featherstone, Your Honor, is to establish what conversation took place between Mr. Featherstone and Mr. Bob Williams which, according to Mr. Featherstone's stipulation, predated any statement he had given to the FBI. I want to know whether there was any inducement, whether there was any encouragement, whether there were any promises made to him, and certainly I am not bound by Bob Williams on that.

Mr. Featherstone: You have got the answers to these questions. You have got the answers.

Mr. Wadden: I want the answers from you, Mr. Featherstone, not from that liar.

. . . . . .

Mr. Neff: The Napue case as he just explained it doesn't even fit within this, because the witness has already testified that recommendations will be made to your Honor with regard to—he has already said that.

Mr. Wadden: Yes, and I want to hear from Mr. Featherstone what these recommendations were.

. . . . . .

Mr. Wadden: . . . Certainly I have got a right to find out what conversations took place between him and Mr. Featherstone on the 17th of June before he started giving statements to the FBI, although his testimony, Your Honor, under oath is that he had given all of the statements before he talked to Mr. Featherstone. Now, if that testimony be true that he gave, then I want the government to produce the other statements which haven't been produced.

Mr. Featherstone: I don't think any time sequence makes any difference. And further, Your Honor, he answered the question. He said recommendations to the court, but that is all.

Mr. Wadden: Well, I want to know what your recommendations were going to be.

. . . . . .

Mr. Featherstone: And further, your Honor, if any question were asked of me, I am sure the answer would have to be prejudicial to these defendants and then they would be screaming for a mistrial.

The Court: Well, I think they would have invited that if they put you on the stand.

Mr. Broaddus: Not this counsel, Your Honor.

. . . . . .

The Court: I don't think at this time that Mr. Featherstone should be called on the witness stand unless it is by agreement of all of defense counsel. Now, he has stated that his testimony probably would be prejudicial to many of the defendants. Now, if they want to invite that, that is one thing. I don't want any situation with mistrial called or the grounds for mistrial.

Mr. Wadden: Your Honor, if I may make the observation, the only way his testimony could be prejudicial to the defendants is if he didn't answer the question of what he promised Bob Williams or what the recommendations were. I am not going into anything else. So obviously it can't be prejudicial to any of the defendants, because no testimony is called upon to be elucidated concerning any of the defendants.

. . . . . .

The Court: Well, I think, first, before ruling on this out of the presence of the jury, we should have

> Mr. Featherstone's statement, sworn statement, to go into the record to see what the evidence will be and whether or not it would be essential to the presentation of your defense."

The record disclosed, however, that no sworn statement was ever provided by Mr. Featherstone. Furthermore, in a subsequent colloquy off the record, Mr. Featherstone admitted that he was advised a day ahead of time that he was going to be called as a defense witness (R. 1494-1496). The court, however, reserved its ruling (R. 1495) apparently to await the filing of the sworn statement by Mr. Featherstone, but which was never filed. On the following day, the request of the defense counsel was repeated, as follows (R. 1715):

> "Mr. Wadden: Your Honor, at this time I renew my motion for the reasons previously stated in the record with regard to calling Mr. James Featherstone to the stand. I believe Your Honor previously reserved your ruling thereon.
>
> . . . . . .
>
> The Court: The motion will be overruled."

During the conference between counsel and the court in chambers, in which the various instructions were discussed and motions raised, the court specifically ordered counsel for petitioner Bennett, among others, not to comment upon the failure of any of the other defendants to take the witness stand (R. 1784).

At this same conference, in discussing the various instructions which the court intended to include in its charge, counsel for the defense specifically requested that the separate conspiracies which are involved in this case be specifically defined to the jury (R. 1825). The court, in response, indicated that it felt that there were at least three separate but related conspiracies involved, and that there

was sufficient evidence to take the case to the jury on those points (R. 1831). The court at this time proposed that portion of the instruction which reads as follows (R. 1844):

> "If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment and that not all defendants were members of or participated in such separate conspiracies, then you may only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirators involved in that particular conspiracy."

This particular instruction was again read to counsel (R. 1855), and specifically objected to by all defendants (R. 1855, 1856).

In the actual charge given to the jury, the following paragraphs were included (R. 2036):

> "If you find that there are separate conspiracies relating to the operation and acts alleged in the indictment in Count I and that not all of the defendants were members of or participated in such separate conspiracies, if you so find, then you may only consider as evidence against the members of such conspiracy the acts and declarations of any co-conspirator involved in that particular conspiracy."

By leave of court, all objections which had been made at the conference on instructions held in chambers the previous day were renewed (R. 2063).

A motion for judgment of acquittal was made at the close of all evidence on behalf of petitioner and was overruled by the trial court (R. 1823, 1824, 1856).

Following the verdict of guilty against petitioner, the filing of a motion for new trial, and the trial court's order overruling same, petitioner together with Robert Lee Williams (who had pleaded guilty) and the other convicted

defendants appeared before the court for sentencing. The following proceedings took place (R. 2077):

> "The Court: Does the Government care to make any statement at this time?
>
> Mr. Featherstone: Your Honor, the Government would like to make a statement in behalf of Robert Williams. The Government is appreciative of the cooperation Mr. Williams has shown. He came forward voluntarily, testified truthfully in behalf of the Government, and in view of that the Government recommends that he be granted a suspended sentence.
>
> The Court: Any further statement on behalf of the Government?
>
> Mr. Featherstone: No, Your Honor."

Thereupon, Williams was sentenced to imprisonment for three (3) years on Count I and the next substantive count, with the provision that only six (6) months of said sentence be served and Williams placed on probation as to all other counts to which he pleaded guilty (R. 2083). In sentencing petitioner Bennett, the court remarked (R. 2083):

> "The participation of Mr. Bennett in the offenses charged herein, of course, was not as great as that of some of the other defendants, and his involvement on Count 8 was not taken too seriously by the Court. His involvement in Count 1 is taken seriously by the Court, as he was an officer of the Union, as an officer he was placed as a trustee of these funds and had a greater responsibility than that of someone just hired by them."

Bennett was then sentenced to two (2) years' imprisonment on Count I, and placed on probation as to Count VIII, the only substantive Count on which he was convicted (R. 2083, 2085).

Thereafter, an appeal was taken in due course to the United States Court of Appeals of the Eighth Circuit where petitioner's judgment of conviction was affirmed on March 30, 1964 (see Appendix "A", p. 66).

REASONS FOR GRANTING THE WRIT.

1. Certiorari should be granted on the first of the questions presented because this case presents an important question affecting the reach of conspiracy prosecutions under Section 501 (c) of Title 29, U. S. C. This was the section added by the recently enacted Landrum-Griffin provisions of Title 29 which for the first time made it a federal crime to embezzle and convert the funds of a labor organization; it was aimed at such abuses of their position by labor union officials whose misdeeds seemed to have gone unprosecuted under state laws. The same Act also provided for the mandatory bonding of union officers who held positions of financial responsibility, Title 29, U. S. C., Section 502. Here is a case which would be the first expression by this Court on the criminal responsibility of a financial officer charged as a co-conspirator under Section 501 (c); it would furnish a perfect vehicle for considering whether or not his criminal liability (i. e., for one offense) should be enlarged by the otherwise innocent administration of his financial duties. Here, the only substantive charge on which petitioner was found guilty was the Hoffman Buick substantive charge involving the conversion for his benefit of several hundred dollars from one local—Local 41, but because he performed his ministerial duty of co-signing Local 41 checks for six other vendors to Local 41, he is deemed to be a member of a single conspiracy to embezzle from three labor organizations in amounts upwards of $240,000. Petitioner Bennett was a conspirator on a single (i. e., the Hoffman Buick) spoke emanating from the hub (Hayes) in a circle conspiracy. He was unaware of the existence of the other spokes or

fraudulent schemes at La Louisiane, Harold's D-X, Greenlease-O'Neill, Paul Greenlease Cadillac, Gallup Stationery and Missouri Mojac. Unless knowledge of the **existence** of other spokes dealing similarly with the hub is either actual or may be inferred from the interdependent nature of the criminal enterprise, the spokes cannot be held to have conspired with each other and to have consented to the overall plan which the hub seeks to accomplish by their joint action, see Note, 57 Columbia L. Rev. 387, 388-392, cited with approval by the Second Circuit in **United States v. Agueci**, 310 F. 2d 817.[1] Here there was nothing so interdependent about the separate frauds and each fraud was complete unto itself and not dependent on any other spoke for success; the proof is the success of the frauds at La Louisiane and Harold's D-X where the government's case-in-chief exculpated petitioner. The Hoffman Buick fraud plainly gives rise to no inference that Bennett had any knowledge that there was a larger plan embracing two other Teamster labor organizations (neither of which he was an officer) at six other vendors.

The decision of the court below is in conflict with the Ninth Circuit's cases of **Canella v. United States**,[2] 157 F. 2d

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[1] *United States v. Agueci*, 310 F. 2d 817 (1962), l. c. 827:

"The nature of the enterprise determines whether the inference of knowledge of the existence of others in one overall conspiracy is justified . . ."

[2] In *Canella v. United States*, 157 F. 2d 470 (1946), the various spokes dealt with the Canella-Campbell hub, without knowledge of each other's existence, using similar schemes and methods to defraud the United States by depriving it of Canella's actions in discharge of his duties free from corruption and fraud. Canella was a Colonel in the Army in charge of the hiring of civilian personnel and the procuring of food and supplies at the Santa Ana Army Base. He agreed with one Campbell that Campbell should find people who wanted jobs and who wanted to sell products and services to the Army, but were willing to kick back to Canella. As the result of this agreement Campbell found Miller, Jensen and Elliott who paid varying amounts from $50 to $100 to Campbell for transmittal to Canella in return for Canella's hiring them as civilian

470; **Daily v. United States**, 282 F. 2d 818 and **Rocha v. United States**, 288 F.2d 545 and with this Court's case of **Kotteakos v. United States**, 328 U. S. 750. The very nature of the typical duties of a labor union's secretary-treasurer

employees. There was no evidence that Miller, Jensen or Elliott knew of the other's transactions with Campbell and Canella, or any of the other frauds practiced by Campbell and Canella. In addition, Campbell arranged a kickback with Wyckoff and McCormac of 2% of each month's gross business for awarding their company (Excelsior) the dairy contract at the Base. This money was kicked back to Canella through Campbell. Wyckoff was Excelsior's plant superintendent who on occasion sent Campbell to cashier McCormac to collect the bribe when Wyckoff himself or one Ranney did not hand it over. There was no evidence connecting Wyckoff and McCormac with Miller, Jensen or Elliott, and no evidence that Wyckoff or McCormac knew of Campbell's and Canella's transactions with Miller, Jensen or Elliott. Also, one Ahmann agreed to pay $100 to Canella after requesting assistance from Campbell in seeing what could be done to get Ahmann assigned to the Santa Ana Base. No payment was made when Ahmann failed to pass his physical examination. There was no evidence connecting Ahmann with, or indicating that Ahmann knew of, Miller, Jensen, Elliott or Wyckoff or McCormac. The Government, realizing that there was no evidence of the various spokes' actual knowledge of the existence of each other, attempted to argue that such knowledge was inferrable from the inter-dependent nature of the criminal enterprise and thus their individual purposes to conspire to defraud the United States would become one common purpose and not separate and similar purposes; it argued on brief to the Ninth Circuit that "each one who dealt illegally with Canella through Campbell undoubtedly knew that Canella was not limiting his unlawful activities to their particular job or enterprise; that if he would take money for their employment he would take it from the next applicant as well," *Id.*, 157 F. 2d, l. c. 477. In rejecting this argument, the Court significantly tested the alleged singleness of the conspiracy by viewing the record from the standpoint of the individual spokes in order to determine whether there was truly a single scheme and common purpose. It may well have been that from Canella's and Campbell's place at the hub they had one general scheme to henceforth use Canella's office as a United States army officer to line their pockets and that the "separate adventures" with Miller, Jensen, Elliott, Ahmann, *et al.*, were the various facets of accomplishing the scheme, but, taking each spoke in turn, the Court could find no such common purpose shared in by him or consent to such scheme, l. c. 157, F. 2d 477:

> "Here there was no purpose common to Wyckoff or McCormac and Miller, nor to Wyckoff or McCormac and Elliott, or any of the others whose acts formed separate spokes

and of the broad rules of evidence permitted in conspiracy prosecutions renders Section 501 (c) an open invitation "to broaden the already pervasive and wide-sweeping net of conspiracy prosecutions" (**Grunewald v. United States**, 353 U. S. 391, 404). Any attempt to apply a less stringent test of guilt to a union-connected-spoke (the secretary-treasurer) in a circle conspiracy than to a non-union-connected spoke (the vendor) should be viewed with disfavor by this Court where as here at least one vendor was admitted by government counsel not to have been "aware" of the scope of this conspiracy, no, sir" (Transcript of Oral Argument, p. 44). At the very least, if the dragnet of the single over-all conspiracy can be so broadened as to include within it the existence of spoke-frauds beyond the union officer's own and beyond his knowledge (actual or inferred), labor unions should be warned for their own protection that the Landrum-Griffin bonding requirements of Title 29, Section 502 have been rendered inadequate to satisfy the legislative purpose.

As an alternative to its holding that the instant record presented a submissible case for one overall conspiracy, the Eighth Circuit found that, even if separate conspiracies are in fact here involved, this case is governed by **Berger v. United States**, 295 U. S. 78, rather than by **Kotteakos**. This holding is a typical alternative holding in

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in this rimless wheel; nor was there any evidence connecting McCormac and Wyckoff with other conspirators."

On this record the Ninth Circuit found five separate conspiracies:

(1) Canella, Campbell and Miller;
(2) Canella, Campbell and Jensen;
(3) Canella, Campbell and Elliott;
(4) Canella, Campbell and Ahmann;
(5) Canella, Campbell, McCormac, Wyckoff and Ranney.

Canella and Campbell were the hub, and each other schemer constituted the separate spokes, but none of the spokes had knowledge (either actual or inferrable) of the existence of other spokes to the conspiracy, therefore, they could have had no common purpose in a single enterprise.

almost every case where a conviction is affirmed against the charge that the multiple-conspiracy doctrine of **Kotteakos** requires reversal and brings into sharp focus the problem of the inter-relationship and proper juxtaposition between **Berger** and **Kotteakos**, see 57 Columbia Law Review 387. Whether a case comes closer to **Berger** or to **Kotteakos** is another problem which has defied definition by the Courts of Appeal since the two cases were left standing more or less side by side as the result of **Kotteakos** in 1946. On the one hand, **Berger** involved two conspiracies and four conspirators, where **Kotteakos** considered thirty-six co-conspirators in eight conspiracies. Since **Kotteakos** the two-conspiracy cases have uniformly affirmed convictions as coming within **Berger** (see **Grissette v. United States**, 5 Cir., 313 F. 2d 187; **United States v. Agueci**, 2 Cir., 310 F. 2d 817; **Harlow v. United States**, 5 Cir., 301 F. 2d 361; **United States v. Santore**, 2 Cir., 290 F. 2d 51; **Hanis v. United States**, 8 Cir., 246 F. 2d 781; cited Appendix "A", p. 54-55), but the three-and-more conspiracy cases have resulted in reversals of convictions on the basis of **Kotteakos**, see **Daily**, *supra*, three conspiracies and twenty co-conspirators; **Canella**, *supra*, five conspiracies and twelve co-conspirators; and **Brooks v. United States**, 164 F. 2d 142, "several" conspiracies and fourteen co-conspirators. Here we have a situation involving 22 co-conspirators where the trial court stated before submitting the case to the jury that he saw at least three conspiracies on the record before him[1] (R. 1841). This

[1] The three overall conspiracies found by the trial court were (1) the restaurant and service station "pad" and "kick-back" arrangements as set forth in Counts II through VII; (2) the improper charging of automobile repairs as set forth in Counts VIII through XIII; and (3) the home-improvement program (including furniture) for the Hayes home under Counts XIV through XVI. Even these three groupings may well consist of separate smaller conspiracies, since different unions were victimized and different co-conspirators (whose existence was unknown to each other) were involved in many of the counts. But certainly, by the most conservative computation, at least the three separate conspiracies found by the trial court were indicated by the evidence.

alone would suffice to exclude the **Berger** doctrine, for as Justice Rutledge noted in **Kotteakos**, "The sheer difference in numbers, both of defendants and conspiracies proven, distinguishes the situation", 328 U. S. at p. 766. The Eighth Circuit opinion has thus thrown the whole problem into greater turmoil by revitalizing **Berger**, traditionally applied only to two-conspiracy cases in the post-**Kotteakos** period, and holding it to be applicable to a three-conspiracy, twenty-two co-conspirator situation. While the **Berger** case has generally been considered as having been limited to its facts by **Kotteakos** (so that the Courts of Appeal have adhered to the latter when three or more conspiracies were involved), the instant decision has injected great doubt as to the respective roles of these two landmark decisions. For here we have a conspiracy case whose numbers bring it close to **Kotteakos**, but which has been held subject to the harmless error doctrine of **Berger**. If the "sheer difference in numbers" is a sufficient distinction, i. e., if the **Kotteakos** opinion really means what it says, the Eighth Circuit opinion raises doubt and conflict which should be reviewed by this Court.

It is further interesting to note that virtually every circumstance in the **Kotteakos** case, which contributed to the ultimate decision there that prejudicial error was injected by joining multiple conspiracies in a single charge, is present in the instant record: repeated charges to the jury containing references to "**the** conspiracy"; impossibility of keeping the separate conspiracies separated, particularly in regard to use of admissions and evidence as to certain defendants only; obvious inability of the jury to keep the conspiracies separate, particularly in the absence of an instruction differentiating the conspiracies. It is not conceivable that these circumstances instilled prejudice in the **Kotteakos** case but not in the instant trial. This, of course, further accentuates the con-

flict created when the Eighth Circuit chose to apply the **Berger** harmless error rule to the present record.

The instant case illustrates the need for this Court to speak out again on the problem of the single conspiracy. Eighteen years under **Kotteakos** have now gone by with results and decisions in lower courts that are far from harmonious and raise questions about the uniformity of the application of criminal justice in the various circuits. Commentators have noted diverse and conflicting rulings and tendencies in the post-**Kotteakos** federal law of criminal conspiracy (see 57 Columbia Law Review 387; 72 Harvard Law Review 920). Whether **Berger's** present vitality is being given too narrow or too broad a reading and whether membership in the single overall criminal conspiracy is being unduly expanded or unduly restricted by the various Courts' of Appeals insistence or lack of insistence on the requirement of a spoke's knowledge of the **existence** of other spokes merit this Court's consideration.

2. The second question stated raises an important question pertaining to the proper charging of juries in conspiracy cases. Here, the trial court (convinced that at least three separate conspiracies had been shown (R. 1841) and not wishing to grant a mistrial after four weeks) sought to avoid the pitfalls of **Kotteakos** by instructing the jury that if they find separate conspiracies relating to the acts alleged in the single conspiracy count, the acts and declarations of a co-conspirator in any particular conspiracy are evidence only against the members of that particular conspiracy. This is tantamount to telling the jury that the separate defendants could be convicted as members of separate conspiracies. It gave the jury a roving commission to convict for one or more separate conspiracies not separately alleged in the indictment contrary to Section 557 of the Criminal Code calling for the separate statement of distinct offenses. The Eighth

Circuit's approval of this instruction is contrary to the Fifth Circuit's holding in **Brooks v. United States**, 164 F. 2d 142, 143, that legal harm is done a defendant by convicting him upon proof that he was engaged with others of the defendants in a separate conspiracy of the general nature of the conspiracy charged and that condemns the practice of leaving it to the jury to pick and choose between conspiracies. As matters now stand, there is no way of telling on the instant record that petitioner was convicted of the same conspiracy as Clevenger. It is possible that Bennett was convicted on the Hoffman Buick spoke and Clevenger on Greenlease-O'Neill. It is equally possible that both petitioner and Clevenger were convicted for their activities at Hoffman Buick, but, assuming the jury found separate conspiracies, this was a separate conspiracy from the single overall conspiracy charged. No one can ever know of what particular offense all twelve jurors found petitioner guilty with Clevenger and Hayes and returned the unanimous verdict required by law—whether the single conspiracy or one of the separate conspiracies permitted to be found within the single conspiracy. The present instruction is erroneous, for once having itself introduced the concept of separate conspiracies into the case, it fails to define them or tell the jury that they cannot be the predicate for returning guilty verdicts under the single conspiracy alleged, or tell the jury what to do with the separate conspiracies and individual defendants after it has found separate conspiracies. After an entire trial has proceeded for weeks on the single conspiracy theory, the mention for the first time on the last day of the trial of the possibility of separate conspiracies does not serve to keep distinct conspiracies separated and could not erase from the jurors' minds the possibility of transference of guilt from one defendant to another, see dissenting opinion by Judge Frank at 137 F. 2d 1062, 1063, specifically ap-

proved in **Kotteakos**, 328 U. S., l. c. 770, fn. 26. The conflict of this case with this Court's **Kotteakos** opinion and **Brooks** is heightened, moreover, by the Eighth Circuit's finding that "there is no way of determining precisely upon this record whether or not the jury in fact found a single conspiracy," Appendix "A", p. 52, Petitioner is left in the position of having been sentenced to two years' imprisonment for an offense (taken seriously by the sentencing court (R. 2083), for which he may or may not have been found guilty. In view of the trial court's remarks at sentencing (R. 2083) it is quixotical to say that he was not prejudiced because no one can determine precisely whether he was convicted of participation in a single overall conspiracy where three labor organizations were cheated of $240,000 or in a single and separate conspiracy where one labor organization was cheated of amounts totalling two thousand and some dollars. Here the prejudice was even greater than in **Kotteakos** because this jury was given a choice not only as to the number of conspiracies (none, one, or more than one) but also as to combinations of guilty defendants (all, some, or none). However, much variety may be the spice of life, it is not, under our jury system, the touchstone of a fair and even administration of criminal justice in conspiracy prosecutions.

3. The Eighth Circuit's approval of the trial court's order to petitioner's trial counsel not to comment in his argument to the jury upon the failure of co-defendants to testify raises an important question relating to the scope of the privilege against self-incrimination; the issue has been characterized in the opinion below as "substantial and troublesome" (Appendix "A", p. 63) and raises procedural difficulties crucial to the prosecution of co-defendants in conspiracy indictments. In addition, the rationale of the instant case is contrary to the Fifth Cir-

cuit's in **DeLuna v. United States**, 308 F. 2d 140, rehearing denied 324 F. 2d 375, and attempts to preserve a harmony with **DeLuna** by reliance on an unwarranted factual distinction.

Here, the Eighth Circuit sought to distinguish **DeLuna** because petitioner did not pin any criminal acts upon his non-testifying co-defendants, yet a careful reading of all the opinions in **DeLuna** (including the one on rehearing after some 13 months' deliberation) evidences no such limitation on the doctrine of that case; rather it directed itself to and approved the right of the testifying defendant's counsel to draw any inferences available from the silence of a co-defendant to show that guilt lay somewhere other than with his client. Thus, here, petitioner's counsel was prevented from making the argument that Bennett had been the innocent pawn of his co-defendants and knew nothing of any overall conspiracy and that, if there were schemes to embezzle, the jury should consider in fixing guilt who had denied participation and who had not, who had opened himself to cross-examination and who had not, who stood undeniably as the receivers of kickbacks and who did not. The prejudice overlooked by the Eighth Circuit is that in argument Bennett's counsel could then (after having heard all the evidence for the first time) have castigated Hayes and Clevenger for their undenied guilt and their involvement of innocent men like Bennett. It is not difficult to perceive that such an argument might have benefitted petitioner who was acquitted of seven of the nine charges against him.

More important, however, to the orderly administration of criminal justice than either the correctness of the instant decision or its conflict with **DeLuna** are the serious procedural difficulties inherent in both decisions. They are well set out in Judge Bell's concurring opinion 308 F. 2d 140, 155, and the *per curiam* on rehearing where

none of the judges indicated that severance under **DeLuna** would be based upon the additional representation that the testifying defendant intended by his testimony to "pin" things on the non-testifying defendants. The procedural difficulties openly predicted and stated in **DeLuna** are now realities; in its petition for rehearing in **DeLuna** the government stated that the case "already had a significant effect on joint trials in the Western District of Texas in that joint trials have been and are now automatically severed and not permitted within the San Antonio, Austin and Waco Divisions" (Petition for Rehearing, p. 2). Recently on February 3, 1964 in the United States District Court for the Western District of Pennsylvania, District Judge Foley in **United States v. Grosso** (Criminal Action 62-281) granted a pre-trial motion for severance on the authority **DeLuna** where (without alleging any intent to pin criminality on non-testifying defendants) an affidavit of counsel alleged that the testifying defendant intended to call attention to his willingness to take the stand and to contrast this with the failure of the other defendants so to do, and to draw inferences from this circumstance favorable to the testifying defendant and unfavorable to the others.

The effect of the decision in this case is to render the procedural problems in multiple-defendant conspiracy cases even more difficult. Can a defendant now promote a mistrial by pinning things on his non-testifying co-defendant and then insisting on his right to comment? Must sufficient criminality to support the right of comment be pinned on the non-testifying defendant through the proferred testimony of his co-defendant on direct examination, or is a reluctant cross-examination enough, or cannot the rational inferences of counsel during argument suffice? If a defendant moves for severance before trial on the basis of **DeLuna** and the instant case, must he affirm that

he does not intend to testify and that his co-defendant intends to pin things on him? Can we be sure that co-defendants will know in advance whether another co-defendant will testify and what will be the nature of his testimony? If we say that the right to a mistrial must await an evaluation of the testifying defendant's testimony (i.e., to see whether he pinned things on his co-defendants), then are we not committing the government to mistrials and retrials after having invested in the presentation of its entire case? If a defendant does affirm in good faith that he intends not to testify, does he waive his right to testify if trial strategy dictates a change? These and many other questions readily suggest themselves to demonstrate that a Pandora's box of error and procedural difficulties has been opened with respect to the prosecution of multiple-defendant conspiracy prosecutions; if the crime of conspiracy is to continue to be the prosecutor's darling, this Court's general supervisory power is needed to resolve the problems and to prevent needless and expensive retrials on reversals arising out of the three-headed conflicting interests necessarily to be judged here under the privilege against self-incrimination, i. e., the testifying defendant, the non-testifying defendant, the prosecution. (See the trial court's opinion, Appendix "B", p. 81, where it did not consider itself bound to follow **DeLuna** because the majority opinion is not a "correct statement of the law as it is or as it should be.")

4. The fourth of the questions presented here involves the proper definition of "substantially verbatim" as used in 18 U. S. C., Section 3500 (e) (2); this was raised but not resolved in **Campbell v. United States**, 373 U. S. 487 (See question No. 2 in the **Campbell** Petition for Certiorari). The question is one of widespread importance in the administration of federal criminal justice; it is poten-

tially present in every prosecution where a government witness has been interviewed prior to trial and the interviewer has made notes. In addition, as pointed out in the **Campbell** Petition for Certiorari, p. 11, the interpretation of "substantially verbatim" has given rise to conflict among the circuits, calling for resolution by this Court.

As the **Campbell** petition noted, the restrictive interpretation of "substantially verbatim" by the First Circuit in **Campbell**, 296 F. 2d 527, 532 (1st Cir.), 303 F. 2d 747, 748 (1st Cir.), conflicted with the Second Circuit interpretations in **United States v. Thomas**, 282 F. 2d 191, 194 (2d Cir.), and **United States v. McKeever**, 271 F. 2d 669, 674-75 (2d Cir.), with the Fifth Circuit interpretation in **Papworth v. United States**, 156 F. 2d 125, 129 (5th Cir.), cert. denied, 358 U. S. 854, and with the interpretation of a district court of the Third Circuit in **United States v. Waldman**, 159 F. Supp. 747, 749. It is also in conflict with Judge Murphy's opinion in **United States v. Aviles**, 200 F. Supp. 711, affirmed 315 F. 2d 186, remanded 11 L. ed. 2d 106, holding that interview notes taken by an assistant United States Attorney were producible under 18 U. S. C., Section 3500 (e) (2) if they contained "in substance what the witness said."

The basic conflict is between the narrow First Circuit interpretation in **Campbell**, *supra* (adopted in effect here by the Eighth Circuit), requiring stenographic completeness in longhand notes and the Fifth Circuit view that longhand notes recording "the highlights of the conversation" (though not word for word, but containing the substance of the information, 156 F. Supp., l. c. 853) qualify as "substantially verbatim", **Papworth**, supra. The instant record presents this conflict with the First Circuit's **Campbell** case even more sharply than does **Papworth** because here (1) the agents made notes on all the witness'

answers (R. 175); (2) the notes were sufficiently complete that the agent could make an accurate transcription (R. 175); (3) the agent attempted to take down in his notes as accurately as he could the witness' answers (R. 189). Petitioner asks that this Court rule whether or not long-hand notes taken under such circumstances are to be governed by the First Circuit's criteria in **Campbell** or the Fifth Circuit's in **Papworth**. It does little good for an appellate court to say (as here) that the question is ordinarily a question of fact to be determined by the trial court and governed by the clearly erroneous standard; the trial courts should be given sufficient guidance so that they will be able to tell whether to apply Judge Wyzanski's "substantially accurate" test in **Campbell**, 199 F. Supp. 905, 906, or Judge Bick's "the witness' own words" exclusionary rule in **Aviles**, 197 F. Supp. 536, 556. It was the latter on which the trial court relied in the instant case; this reliance is now said not shown to be clearly erroneous. Somehow it is incongruous that two such incompatible standards adopted by district courts can both be right because neither is clearly erroneous; in effect, the irreconcilable understandings of the "substantially verbatim" requirement by District Courts then become rigid, fixed, and unevenly applied as between defendants in different courts within the same or different circuits.

On reason the **Papworth** standard and definition of "substantially verbatim" is the better one; the form of the agent's recording of the witness' statement should not be exalted over its substance. The result should not depend upon adoption of the interviewed person's grammar or particular phraseology. An agent for his own purposes will ordinarily record the substance of a witness' remarks. He ought not to be accorded an open invitation to insulate his recording from production to the defense by

his testimony—ordinarily irrebuttable— that he rephrased the witn ' words or (as here) had another agent participate the interview so as to split the note-taking. Rather, where a law enforcement officer finds it adequate for his own use to record the substance of a witness' statement, such recording should likewise be deemed adequate for the use of the defense.

As an alternative ground, the Eighth Circuit held that petitioner failed to show error to be prejudicial because there was nothing in the record to indicate any likelihood that the notes would vary substantially from the smooth reports. It is somewhat paradoxical to charge the party innocent to the destruction of the notes with the responsibility of showing their variance from the smooth report, but in any event it is significant that no matter where the responsibility should lie, the instant case record (contrary to that in **Ogden v. United States**, 323 F. 2d 818) does not reflect that nothing was omitted from the statement that was present in the notes or that anything was added to the statement that was not in the notes. If the destroyed notes were "substantially verbatim" under guidelines declared by this Court, then a "court should not confidently guess what the defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled." **Rosenberg v. United States**, 360 U. S. 367, 371.

In the last analysis an additional question to be resolved here is whether or not the agent's destruction for any reason of his notes concerning his interviews with Robert Williams is a non-compliance under Section 3500 (d) calling for the striking of Williams' testimony. This "important question" of the construction of subsection (d) was specifically left open by the majority in the **Campbell** case, 365 U. S., l. c. 98; it must turn upon the meaning in subsection (b) of the phrase "in the possession

of the United States", that is, whether it means in the possession of the United States at any time or means just at the precise moment in a trial when a statutory order to produce is made. It is clear that the First Circuit and the dissenters in the **Campbell** case understand it to mean the latter.

To read the statute as pertaining simply to statements "in the possession" of the Government when an order to produce is made and not pertaining to statements which **were** "in the possession" and **should now be** is to open the problem to questions of unfairness, chicanery and overzealousness. It means that if the raw interview notes help the Government they can be signed, approved and preserved under (e)-(1); if they do not aid the prosecution they can be destroyed and the helpful portions thereof incorporated in an agent's lengthy summary report. For instance, this places the burden on the witness to remember what has been omitted and to refuse to approve the agent's report some days or weeks later until these portions have been re-incorporated in the agent's report; the normal failures of human memory cannot help but overlook vital omissions so that the approved agent's report must necessarily be more favorable to the prosecution than the original interview—if an overzealous agent (whose interest in a favorable outcome cannot wholly be discounted) so desires. The Agent Myers' practice over 21 years of destroying interview notes, as comprehensive as those taken from Williams **where he attempted to take down the answers as accurately as he could** (R. 189), is an open invitation—if approved—to circumvent Section 3500.

When these issues were before this Court in **Campbell v. United States**, supra, the Court found it unnecessary to decide them. The Solicitor General in his Brief in Opposition to the Granting of the Petition for Writ of Certiorari represented to the Supreme Court, p. 15: "and

while it is not deemed administratively feasible to retain all the personal notes taken by the Agent, those notes which in themselves constitute a producible statement or a transcription thereof are retained for purposes of production under the statute." Such a statement itself furnishes the logical basis for the definition of "substantially verbatim" here urged, because it assumes a prosecutive infallibility in order to justify destruction of original interview notes of key witnesses to indictments already returned and to be returned.

5. The refusal of the trial court, upheld on appeal, to allow petitioner to call one of the three government prosecutors as a witness raises a question under the Sixth Amendment which could have a serious impact on criminal jurisprudence in the federal courts. Moreover, the holding of the Eighth Circuit on this point now provides the government with a convenient shelter to protect all of its informers against possible impeachment in any trial—all the prosecution need do is make certain that the government agent dealing with the informer is an attorney and that he becomes a member of the trial staff when the case is presented in court.

In the instant case, the "informer" was Robert Williams, a co-defendant who became the chief government witness and gave extensive testimony concerning the various facets of the alleged conspiracy. He first agreed to switch sides and become a government witness in a private conversation with Mr. James Featherstone, one of the government counsel, in an automobile in Kansas City (R. 268-271). On cross-examination, Williams denied that any specific promises or bargains were made in this conversation; he would only state that Featherstone agreed to make "recommendations" of an undefined nature (R. 273-274). The defense then sought to introduce Featherstone as a witness, for the sole purpose of ascer-

taining what, if any, specific promises, agreements, or recommendations be discussed with Williams in order to induce the latter to become a government witness (R. 1487-1497, 1715).

Both the trial court and the Eighth Circuit felt that this was a matter within the **discretion** of the trial court, and that the latter may properly prohibit the defense from calling a government attorney as a witness, apparently without regard to the impact of the anticipated testimony. In this respect, the decision below squarely conflicts with the Second Circuit holding in **United States v. Alu**, 246 F. 2d 29, which follows the philosophy of the American Bar Association's Canons of Professional Ethics, No. 19. The **Alu** case recognized the undesirability of calling a litigant's attorney as a witness, but noted that such practice would be improper **only** if such testimony "can be avoided consonant with the end of obtaining justice," 246 F. 2d at p. 33. In fact, the decision below even conflicts with the Eighth Circuit's own previous opinion in **Gajewski v. United States**, 321 F. 2d 261, 268:

> "To be sure, an accused's right to call relevant witnesses and to present a complete defense may not be abrogated for the sake of trial convenience or for the purpose of protecting a United States Attorney from possible embarrassment while testifying, if he possesses information vital to the defense. . . ."

Neither **Alu** nor **Gajewski** suggests that a trial court can, in its "discretion", preclude the testimony of a litigant's counsel if such is essential to the case. But that is exactly what was done here, for certainly the Featherstone testimony was vital and essential:

(1) Featherstone, according to the evidence, was the **only** one present when Williams agreed to become a government witness;

(2) Some sort of promise was made to Williams, the nature and extent of which he chose not to reveal. Even the Eighth Circuit conceded that "Williams' testimony with respect to the nature of the recommendations he expected is not as specific as might be desired" (Appendix, p. 59);

(3) Featherstone would be the only other person in the world to know just what promises were made to Williams;

(4) Williams was the main government witness, whose impeachment would unquestionably be a vital matter to the defense.

Yet, in view of this, the Eighth Circuit nevertheless held, that the matter was **discretionary** with the trial court and that the trial court did not abuse its discretion by prohibiting the Featherstone testimony because it might involve other matters (i. e., protection for Williams against Teamster violence) which would be prejudicial to the defense. This was indeed weak justification for the refusal, since the trial court, having been forewarned about these other prejudicial matters, could have easily instructed counsel and the attorney-witness to limit the testimony to the "recommendations" only. Therefore, the danger of Featherstone's injecting irrelevant prejudicial matter into the trial would have been summarily eliminated; and the fears of the court below on this matter are thus revealed as illusory and scarcely an excuse for failure to follow its own guidelines as established in **Gajewski**.

The importance of this issue to the uniform administration of criminal justice is at once obvious. The use of the informer is becoming more and more prevalent in criminal prosecutions, and the impeachment of such a witness is a vital element of the defense in every such case. Some clarification is, therefore, needed as to the

extent to which the defense may probe in order to learn the secret deals, promises, and agreements (if any) which were used to purchase the informer's testimony in the face of the Sixth Amendment's unconditional guarantee that a defendant shall have "compulsory process for obtaining witnesses in his favor." The Eighth Circuit has now engrafted a significant exception: government counsel may be immune from such "compulsory process," particularly when they have dealt secretly with informers and have discussed (in addition to the purchase price for the testimony) matters involving the physical protection of the informer. Perhaps, considering the complexities of modern criminology and the broad guarantees of the Fifth Amendment that no one need incriminate himself, the Eighth Circuit's rule is a salutary one which will encourage other informers to cooperate with their government in its fight against crime, but it implications call for expression by this Court. For such an exception to the Sixth Amendment would provide the government with an inviolable repository for the contents of its deals with informers, and substantially impair the opportunity of any defense counsel to expose to impeachment the testimony and motives of the informer-witness.

Let there be no doubt that the instant case is a typical one in which the informer's cooperation was obtained at a price, and is no different (and entitled to no different treatment) than the numerous other prosecutions using "purchased" testimony. The record speaks for itself: Williams admitted that "recommendations" were discussed, but denied that anything specific was suggested or promised (R. 274); Featherstone and other government counsel were vehement in their opposition to the defense request for Featherstone to testify (R. 1487-1947); Featherstone failed to provide the court with a **sworn** affidavit as to what his testimony would be, as requested by the court (R. 1495); at the ultimate sentencing, Featherstone

stepped forward and (most unusual for a government prosecutor) volunteered the specific recommendation to the trial court that Williams be given a suspended sentence (R. 2077).

Petitioner does not mean to condemn the use of informers by the government; the foregoing is pointed out merely to demonstrate that the instant case is not an unusual or extraordinary case, but is the typical situation in which the informer was promised and received something substantial for his cooperation. It is in the light of this that the record below should be examined; if the Eighth circuit decision is to stand, it will furnish a precedent and modus operandi for all cases involving an informer's testimony. The court below attempted to minimize the importance of the Featherstone testimony by noting that the informer-witness had already admitted that "recommendations" in general had been discussed. But the witness declined to remember anything further concerning his conference with Featherstone, and specifically stated that he did not know what to expect as a reward for his cooperation (R. 274). Certainly the impeachment value of the witness' admission that some undescribed "recommendations" were mentioned is far less than would be specific testimony by an officer of the court as to what recommendations were in fact promised; the defense and the jury were thus entitled to more explicit details on the matter, and should not have been compelled to rely on the vague and indefinite answers of an admitted ex-convict (R. 284), thief (R. 282) and shoplifter (R. 291). The Featherstone testimony was vital and important; the real issue, which this Court is now asked to resolve, is whether the trial court has the **discretion** under these circumstances to immunize government counsel from testifying.

Petitioner submits that this issue, i. e., the use of counsel as a witness, has been discussed many times by lower

courts, but has never been considered by this tribunal. In view of the conflicts herein suggested, the context in which it is postured in the instant case, and the increasing (and even necessary) prosecutive use of informers, a review of the issue by this Court is necessary to the uniform administration of criminal justice.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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